

1-2009

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Recommended Citation

Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431 (2009).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol60/iss6/10

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Second Amendment Decision Rules

CALVIN MASSEY*

INTRODUCTION

By its decision in *District of Columbia v. Heller*¹ the United States Supreme Court announced a constitutional rule²—the Second Amendment guarantees a right of individuals to keep and bear arms—but offered little guidance concerning the decision rules³ that serve to identify when that right is infringed. This Essay is an attempt to sketch the issues that the Court must confront to develop those decision rules, and to offer some thoughts concerning how those issues ought to be resolved. I do not intend to address the question of whether the Second Amendment right is applicable to the states, either via the Due Process Clause or the Privileges and Immunities Clause of the Fourteenth Amendment. No matter which governments are obliged to respect Second Amendment rights, the courts must articulate the precise decision rules that define the scope of Second Amendment rights.

There are at least five aspects of decision rules that must be confronted by courts. First, the constitutionally operative right must be precisely defined. Second, those who are entitled to assert the right must be identified. Third, any special situations that qualify the right in any fashion must be specified. Fourth, the burden upon the right that constitutes a presumptive infringement of it must be articulated. Finally, the level of scrutiny to be employed by courts must be phrased in a useable manner. Each of these issues will be discussed below.

Often the Court broadly defines the constitutionally operative rule, and the limits the Court places upon the right embodied by the operative rule are contained in the standard of judicial review used to determine whether the constitutional right has been infringed.⁴ Sometimes, as in

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1. 128 S. Ct. 2783 (2008).

2. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (stating that doctrines representing judicial understanding of the proper meaning of a constitutional provision are “constitutional operative propositions”).

3. *Id.* (stating that doctrines that instruct courts on the method of deciding whether government action complies with a constitutional provision are “constitutional decision rules”).

4. For example, the Court has construed the Takings Clause (U.S. CONST. amend. V: “nor shall

free speech, certain situations will be identified that merit specialized decision rules.⁵ With some frequency the burden that constitutes an infringement upon a constitutional right will be assessed in conjunction with the selection of an appropriate constitutional decision rule, as is the case with the distinction between content-based and content-neutral speech regulations.⁶ Rarely are entire categories of people barred from asserting a constitutional right. *Heller*, however, invites consideration of all of these issues and leaves us with the barest of guidelines for the formulation of constitutional decision rules.

I. DEFINITION OF THE RIGHT

According to the Court, there is "no doubt . . . that the Second Amendment conferred an individual right to keep and bear arms."⁷ To "bear arms" is to carry arms, whether or not in a military capacity.⁸ More simply, the bearing of arms is the state of "being armed and ready for offensive or defensive action in a case of conflict with another person."⁹ But, said the Court, "[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation . . ."¹⁰ What was at issue in *Heller* was the District of Columbia's law that completely banned handgun possession in one's home and required that lawful firearms kept at home be rendered inoperable, thus totally stripping the arms owner of the ability to use his

private property be taken for public use, without just compensation") to forbid governments "from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That is an operative rule. A variety of decision rules implement this operative rule. Regulations that impose a loss of all economically-viable use (except when that loss is attributable to state action that does no more than abate a use which would be a nuisance under pre-existing law) are takings. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016-18 (1992). Permanent dispossession of property constitutes a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Exactions imposed as the price of a building permit are governed by two distinct decision rules, usually referred to as the "essential nexus" and "rough proportionality" principles. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). In general, a multi-factor test is used when none of the more specific decision rules dispose of the matter. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

5. For example, this is true with respect to speech rights of students and prisoners, and speech on public property. *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987) (prisoners); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (public forum); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (prisoners); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (students).

6. The entire point of subjecting content-based speech restrictions to more stringent scrutiny than that applicable to content-neutral speech restrictions is the belief that content-based restrictions are far more likely to suppress ideas, the central concern of free speech. *See, e.g., LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW* 789-92 (2d ed. 1988).

7. *District of Columbia v. Heller*, 128 S. Ct. 2387, 2799 (2008).

8. *Id.* at 2793.

9. *Id.* (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

10. *Id.* at 2799.

weapons for self-defense.¹¹ At a minimum, then, the individual right to bear arms extends to the right to carry firearms for the “defense of self, family, and property.”¹²

To what kinds of firearms does that right extend? The *Heller* majority concluded that “the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”¹³ *United States v. Miller*, the Court’s leading (albeit cryptic) pronouncement on the Second Amendment prior to *Heller*, declared that the Second Amendment right, whatever its scope, applied only to firearms “in common use at the time” by the citizenry that was eligible for militia service.¹⁴ That construction was read by the *Heller* majority to indicate that the Second Amendment right extends to “weapons . . . typically possessed by law-abiding citizens for lawful purposes,”¹⁵ a limit that the Court thought was “fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”¹⁶

There is some circularity to this formulation. All firearms are dangerous, so we must suppose that dangerousness is a relative matter. May a firearm be banned because it is especially dangerous to its user, or is it danger to others that matters? On the former reading, an inexpensive, cheaply made handgun with a known risk of barrel or breech explosion might be banned. On the latter reading, a handgun that is manufactured entirely from materials undetectable by metal detectors might be forbidden. What about a rifle or shotgun equipped with double set triggers?¹⁷ Is such a weapon a sufficient danger to its user or others that it is disbarred from the Second Amendment right?

Nor is there much stability in the notion of unusual weapons. Muzzle-loading Kentucky long rifles were commonplace at the turn of the nineteenth century,¹⁸ but are the province of antiquarian black-powder enthusiasts now. The pocket derringer was a staple weapon of the mid-nineteenth century,¹⁹ but is now far less common. This inquiry is

11. *Id.* at 2788.

12. *Id.* at 2817.

13. *Id.* at 2791–92.

14. 307 U.S. 174, 178–79 (1939).

15. 128 S. Ct. at 2816.

16. *Id.* at 2817.

17. Double set triggers consist of two triggers mounted fore-and-aft within a trigger guard. See HallowellCo.com, Double Set Triggers, http://www.hallowellco.com/double_set_triggers.htm (last visited June 10, 2009). When the rear trigger is pulled, it “sets” the forward trigger by reducing the pressure necessary to discharge the weapon. *Id.* A light pressure trigger is sometimes colloquially referred to as a “hair-trigger,” a term derived from the notion that pressure on the trigger as light as a hair would serve to fire the weapon. See *id.*

18. See Dallas Bogan, A Short History of the Kentucky Long Rifle, <http://www.tngenweb.org/campbell/hist-bogan/KentuckyLongRifle.html> (last visited June 10, 2009).

19. See DerringerPistol.com, A History of the Derringer Pistol, <http://www.derringerpistol.com/>

misplaced. The question should not be whether a particular type of weapon is ubiquitous or generally available; the question should be whether a weapon is useful for self-defense or other lawful purposes without posing any unusual risk of harm to the user or to third parties. A cannon, such as a 105 mm howitzer,²⁰ is neither practical nor particularly useful for individual self-defense. While a grenade launcher²¹ might be somewhat more useful, such a weapon poses unusually high dangers to the user and third parties.²² A fully automatic rifle, such as the AK-47,²³ is a potent defensive weapon, but its high rate of fire—600 rounds per minute—means that its thirty-round magazine would be emptied in three seconds.²⁴ There is considerable risk of harm to others posed by such rapid discharge of thirty lead slugs, each with a diameter of about 5/16 of an inch, traveling at a speed of about half a mile *per second*, under conditions of extreme stress to the shooter.²⁵ On the other hand, thirty well-placed rounds in an intruder filled with murderous intent is likely to be a highly effective defense of self. By the Court's metric, the AK-47 is hardly unusual; it is said to be the most widespread weapon in the world.²⁶ Of the estimated 500 million firearms worldwide, some 15%, or 75 million, are AK-47s.²⁷

To limit the Second Amendment right by type of firearm, the Court will inevitably be forced to consider criteria other than the ubiquity of the weapon. Whether a weapon is usual or unusual is a poor proxy for evaluating its utility to self-defense or lawful uses of firearms. However, the popularity of any type of weapon is a rough guide to the public view of the utility of the weapon, and the popular view on the appropriate modes of defending self, family, and home is entitled to considerable weight. If we take the Second Amendment seriously, it secures an

history.htm (last visited June 10, 2009).

20. See U.S. Army Fact Files, Towed Howitzer, <http://www.army.mil/factfiles/equipment/indirect/mr02.html> (last visited June 10, 2009).

21. The M79 40mm grenade launcher (now replaced in U.S. military service by the M203) is a typical example of this type of weapon. See Gary's Place, M79 40mm Grenade Launcher, <http://www.inetres.com/gp/military/infantry/grenade/M79.html> (last visited June 10, 2009).

22. *Id.* The M79 is unsafe to the user if discharged at any range less than thirty-four yards to the target. *Id.* Confrontations that would support lawful self-defense are likely to occur at closer ranges, and the use of a grenade launcher at close range is foolish and exceedingly dangerous to life and property. *Id.*

23. For information on the AK-47, see Kalashnikov Home Page, The AK Site, <http://kalashnikov.guns.ru/> (last visited June 10, 2009); Modern Firearms, Kalashnikov AK-47 AKM Assault Rifle, <http://world.guns.ru/assault/as01-e.htm> (last visited June 10, 2009); AK47 Information, <http://www.ak-47.us/AK-47info.php> (last visited June 10, 2009).

24. See AK47 Information, *supra* note 23.

25. *Id.*

26. See Kalashnikov Home Page, *supra* note 23.

27. See Phillip Killicoat, *Weaponomics: The Global Market for Assault Rifles 3* (World Bank Pol'y Res. Working Paper No. 4202, 2007), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/04/13/000016406_20070413145045/Rendered/PDF/wps4202.pdf.

individual right to carry arms for self-defense, and the popular verdict on the arms that are utile for that purpose is surely as legitimate a source of constitutional construction as the musings of cloistered philosophers.

II. HOLDERS OF THE RIGHT

Constitutional rights are not universally possessed.²⁸ Only citizens may assert the protections of the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment.²⁹ While minors are not deprived of constitutional rights, their ability to assert them is limited and, in some instances, may be subservient to the right of parents to control some circumstances of their upbringing.³⁰ Thus, it is not surprising that the Court in *Heller* declared that the Second Amendment right it announced “should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”³¹ These two categories do not necessarily exhaust the categories of people deprived of Second Amendment rights. Among the additional possibilities are minors and aliens. Each of these categories raises questions about the scope and the rationale for exclusion from the Second Amendment.

Felons come in a wide variety of offenders. Of course felons are burglars, rapists, and murderers. But it is also a felony to structure a transaction with a financial institution in such a way as to avoid statutory currency-reporting requirements,³² to marry or carry on a commercial enterprise for the purpose of evading the immigration laws,³³ and even to purchase \$100 of food with food stamps which you are not entitled to use.³⁴ Are such felons to be barred from the constitutional right to carry a firearm to defend their home and family from deadly intrusion? If distinctions are to be drawn between felons, on what principled basis are some felons to be denied access to a constitutional right? Perhaps criteria can be developed to determine which felonies raise a heightened risk of violence, but it might be equally plausible to think that the commission of any felony creates a presumptive inclination toward lawlessness, sufficient to warrant exclusion of the felon from the protections of the Second Amendment. Even a bright-line rule drawn at felonies raises

28. For example, the Constitution generally has no applicability to nonresident aliens. *See, e.g.,* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). *But see* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (extending constitutional right of habeas corpus to certain nonresident aliens held by American armed forces). Also, due process does not extend to deportation proceedings. *See, e.g.,* *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950).

29. *See* U.S. CONST. art. IV, § 2; *id.* amend. XIV.

30. *See, e.g.,* *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

31. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008).

32. *See, e.g.,* 31 U.S.C. §§ 5313(a), 5322 (2006).

33. *See* 8 U.S.C. § 1325(c), (d).

34. *See* 7 U.S.C. § 2024(b).

some question of whether persons convicted of violent misdemeanors ought to be denied the benefits of the Second Amendment.

Who is mentally ill? Was Thomas Eagleton mentally ill when he was ousted from the 1972 Democratic ticket because he had received electroshock therapy for depression?³⁵ Is a person afflicted with treatable bipolar disorder mentally ill? Is a person who takes prescription drugs to treat chronic depression mentally ill? What is the status of a person who was once hospitalized for extreme depression? Is a person suffering from posttraumatic stress disorder mentally ill? If the Court perseveres in characterizing the mentally ill as a category of people who are denied access to the Second Amendment right, it must create some objective criteria to define the category. Reliance upon medical and psychological professionals to perform this task is fraught with enormous difficulty, for not all mentally unstable people seek treatment, and it is entirely possible that the medical and psychological criteria for a diagnosis of "mentally ill" is itself unstable and fluid.³⁶ Of course, after some grotesque episode of criminal violence with firearms it may be easy to spot the indicators of mental instability, but it is far harder to see them in advance of the tragedy.

Are minors exiled from the Second Amendment? Minors are entitled to the protections of due process,³⁷ equal protection,³⁸ free speech,³⁹ and freedom to exercise their religious beliefs,⁴⁰ to name only a few of the constitutional rights that are available to each lawful resident of the United States. If minors have no Second Amendment rights, the Court must advance plausible reasons why individual minors have no right to carry a firearm for purposes of self-defense. It cannot be that minors lack the capacity to use firearms in a safe manner for law-abiding purposes. Consider Arthur MacArthur, the father of General Douglas MacArthur.⁴¹ Arthur volunteered for service in the United States Army at the outbreak of the Civil War, when he was seventeen.⁴² He fought in combat at Stone's River, and led his regiment to the top of Missionary Ridge when he was but eighteen, a feat for which he later received the

35. See Francis Wilkinson, *The Running Mate Who Wasn't*, N.Y. TIMES MAG., Dec. 30, 2007, at 14, available at <http://www.nytimes.com/2007/12/30/magazine/30wwln-eagleton-t.html>.

36. For example, homosexuality was once regarded as a mental illness but is not viewed as such now. See U.C. Davis Psychology, Facts About Homosexuality and Mental Health, http://psychology.ucdavis.edu/rainbow/HTML/facts_mental_health.HTML (last visited June 10, 2009).

37. *In re Gault*, 387 U.S. 1 (1967).

38. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982).

39. See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).

40. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992).

41. See generally KENNETH RAY YOUNG, *THE GENERAL'S GENERAL: THE LIFE AND TIMES OF ARTHUR MACARTHUR* (1994).

42. *Id.* at 20-21.

Congressional Medal of Honor.⁴³ He was a lieutenant colonel in command of a regiment of infantry at nineteen.⁴⁴ Audie Murphy, perhaps the most decorated American soldier ever, was sixteen when he enlisted in the Army (though claiming to be eighteen) in 1942, and performed most of his feats of heroism before he turned eighteen.⁴⁵ He was a crack shot with a rifle from the time he was a child, hunting small game to feed his impoverished family of sharecroppers in north Texas.⁴⁶

Limitation of Second Amendment rights to citizens may have some textual and structural foundation. The Amendment's prefatory clause recites that a "well regulated Militia" is "necessary to the security of a free State."⁴⁷ The first federal militia act established the militia as every able-bodied free white male citizen between the ages of eighteen and forty-five.⁴⁸ Because the point of a militia was to defend a free polity,⁴⁹ it is reasonable to suppose that the prefatory clause presumed that the militia would be drawn from citizens of that polity. Thus, when the operative clause secures the right of "the people" to keep and bear arms, it may be reasonable to treat "the people" as consisting of the citizenry. Of course, this logic would suggest that the people are only those citizens eligible to serve in the militia, and *Heller* rejects such a limited reading of "the people."⁵⁰ There is, however, no reason to think that the concept of the militia is necessarily as limited as it was conceived by our eighteenth-century ancestors. But if all the people are the inchoate militia, it becomes necessary to explain why only citizens may carry arms if lawfully-resident aliens are part of this inchoate militia.

Even this brief consideration of the possible ways in which Second Amendment rights might be limited to less than all "the people" reveals the difficulties of finding principled and practical methods of defining the categories of persons denied Second Amendment rights. The difficulties attendant to this quest suggest that this avenue of bounding Second

43. *Id.* at 74–79, 160–62.

44. *Id.* at 113.

45. See CHARLES WHITING, *AMERICAN HERO: THE LIFE AND DEATH OF AUDIE MURPHY* 10, 21–26 (2000). There is some doubt about his birth date. Most biographies, including Whiting's, treat his birth date as June 20, 1924, but there is some evidence that he was actually born on June 20, 1926, making Murphy sixteen years of age when he enlisted. See Audie Murphy, Reference.com, http://www.reference.com/browse/wiki/Audie_Murphy (last visited June 10, 2009); Murphy, Audie Leon, New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Audie_Murphy (last visited June 10, 2009); Leslie Wagner, *A Hero Like No Other: Audie Murphy*, EXAMINER.COM, July 2, 2009, <http://www.examiner.com/x-2242-Dallas-History-Examiner-y2009m7d2-A-hero-like-no-other-Audie-Murphy>.

46. WHITING, *supra* note 45, at 22.

47. U.S. CONST. amend II.

48. *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2800 (2008) (citing Act of May 8, 1792, ch. 33, 1 Stat. 271).

49. *Id.* at 2799–800.

50. *Id.* at 2790–91.

Amendment rights may not be worth the effort. As will be seen below, there may be better ways to address the concerns that underlie the impulse to place limits on those who can assert Second Amendment rights.

III. SITUATIONAL LIMITS

The *Heller* majority asserted that nothing in the Court's opinion "cast[s] doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."⁵¹ This nascent doctrine mimics the special situations rules that litter the landscape of free-speech law. Just as speech rights become qualified in schools,⁵² prison,⁵³ the military,⁵⁴ and on public property⁵⁵ or with respect to public employment,⁵⁶ so will Second Amendment rights be limited to areas that are not sensitive. But what are these places? To what are they sensitive? Suppose that law-abiding students at Virginia Tech were permitted to carry firearms; might the carnage of April 2007 have been reduced?⁵⁷ Perhaps the places that may be cleansed of firearms are those in which firearms possession is inimical to their normal operation. But does this advance analysis? So long as a firearm is concealed and safety catches engaged, the hidden presence of a firearm carried by a law-abiding person is not inconsistent with the normal operation of virtually any facility or activity. The rejoinder is that we cannot be sure that all such arms bearers are or will remain law abiding; thus we must ban all firearms to preserve the core function of "sensitive" places. On this view, sensitive places must be those in which lawless use of firearms would pose unusually high hazards. Why select schools and government buildings? Surely this principle extends to airplanes. What about trains or buses, or public transit generally? If the principle involved is the risk of catastrophic injury to others, would that authorize the banning of firearms possessions in autos traveling on busy Los Angeles freeways, but exempt sparsely attended churches or athletic events? Is the idea of sensitive places so illimitable that it permits the banning of firearms in all public places? If this is so, it would permit the banning of firearms in

51. *Id.* at 2816–17.

52. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

53. *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977).

54. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986).

55. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

56. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

57. *See* Christine Hauser, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, available at http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?_r=2&scp=1&sq=virginia%20tech,%20april%202007&st=cse.

national forests where hunters have for years lawfully stalked game with high powered rifles or shotguns.⁵⁸ This reading would reduce the Second Amendment right recognized in *Heller* to the right to possess an operable firearm in your own home for purposes of self-defense. Perhaps that is all *Heller* actually did, but if that is so there was no need to refer to sensitive places as venues from which firearms could be excluded.⁵⁹ It would have been sufficient to note that the only place in which the Second Amendment right operates is one's own home.

The Court's suggestion that there are some situations or places in which firearms may be banned leaves unexplored a vast *terra incognita*. This terrain is so uncertain that we cannot be sure that any of it is protected by the Second Amendment. If the Second Amendment does penetrate this territory, we have no sense of whether it is an ocean of arms that surrounds sensitive arms-free islands, or whether it is a Sahara of banned arms encompassing the occasional Second Amendment oasis.

IV. BURDEN ASSESSMENT

At what point does a regulation of firearms so burden the Second Amendment right that it constitutes an infringement of the right? One way of addressing this would be to distinguish between possession and acquisition of firearms. The *Heller* majority may have hinted that this distinction is viable when it remarked that "nothing in our opinion should be taken to cast doubt on... laws imposing conditions and qualifications on the commercial sale of arms."⁶⁰ While a right to possess something may seem hollow without the right to acquire it, that is the free-speech status of obscene materials depicting adults.⁶¹ Firearms, however, are not obscene. Because obscenity is not constitutionally protected speech, the right of private possession and use of obscenity is an aberration.⁶² Holders of the Second Amendment right are entitled to keep and carry firearms that are "typically possessed by law-abiding citizens for lawful purposes."⁶³ The right to possession of such arms is at the core of the Second Amendment right, rather than being an exception

58. See Memorandum of Understanding among the U.S. Dep't of Agric., U.S. Dep't of the Interior, & Am. Sportfishing Ass'n et al. (2006), available at http://www.fs.fed.us/recreation/programs/trails/shooting_mou.pdf.

59. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008).

60. *Id.* at 2816-17.

61. Compare *Stanley v. Georgia*, 394 U.S. 557 (1969) (protecting private possession of obscenity) with *United States v. Orito*, 413 U.S. 139 (1973) (upholding federal law banning the interstate transport of obscenity even when such transport is for private use), and *United States v. 12 200-Foot Reels of Super 8mm Film*, 413 U.S. 123 (1973) (upholding federal law prohibiting importation of obscenity even for private use), and *United States v. Reidel*, 402 U.S. 351 (1971) (upholding federal law prohibiting mailing of obscenity). By contrast, *Osborne v. Ohio*, 495 U.S. 103 (1990), held that even the private possession of child pornography was constitutionally unprotected.

62. See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

63. *Heller*, 128 S. Ct. at 2816.

to a general rule that use and possession of firearms enjoys no constitutional protection. Thus, the Court's dictum in *Heller* must refer to some other mechanism for identifying those burdens that infringe the Second Amendment right. Unfortunately, the Court did not tell us what that mechanism might be. We must speculate, and my speculation follows.

There may be different burdens that constitute a presumptive infringement of a constitutional right, and each type of burden might trigger differing levels of judicial review. For example, the law of free speech distinguishes between content-based and content-neutral regulations of speech.⁶⁴ The former regulations are subjected to a considerably more searching review than the latter.⁶⁵ The rationale for the distinction is based on the belief that the core purpose of the free-speech guarantee is to prevent governmental censorship, and content-based regulations are far more likely to be the tools of censorship than content-neutral regulations.⁶⁶ Free-speech law sharpens this point by treating viewpoint-based regulations as virtually invalid *per se*.⁶⁷ If the core purpose of the Second Amendment is self-defense, perhaps the analogous distinction is between regulations that burden the possession of arms commonly used for self-defense and those that are not so useful. But this distinction will not work. First, it duplicates the definition of the Second Amendment right by type of firearm to which the right extends. Second, it makes no allowance for the regulations that might justifiably condition exercise of the right, such as completion of a gun-safety course as the prerequisite for a license to possess a handgun.

There are two ways that burdens can be evaluated. One method is to assess the burden as a predicate for determination of the level of judicial review that should be applied. A version of this approach is used in dormant commerce clause analysis, where overt discrimination against interstate commerce is subjected to strict scrutiny while nondiscriminatory measures that only incidentally affect interstate commerce are presumed to be valid and evaluated under a more deferential standard.⁶⁸ Similarly, only purposeful racial discrimination is subjected to strict scrutiny, while adventitious discrimination resulting from racially-neutral classifications is presumptively valid and subjected to minimal scrutiny.⁶⁹ The other approach is to lump the burden into the

64. See, e.g., *TRIBE*, *supra* note 6.

65. *Id.*

66. *Id.*

67. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

68. Compare *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), with *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

69. See *Washington v. Davis*, 426 U.S. 229 (1976).

level of judicial review as a factor to be considered in evaluating the constitutional legitimacy of the governmental action. The two approaches are not mutually exclusive. For example, the test for evaluating the validity of a nondiscriminatory state regulation of interstate commerce requires courts to assess the burden on interstate commerce in relation to the putative local benefits of the measure.⁷⁰ In other areas the burden on the constitutional right is examined solely as a factor within the test that comprises judicial review. For example, the validity of governmental prerequisites to voting that apply to all voters are evaluated under a balancing formula that requires courts to “identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule.”⁷¹ The test requires judicial assessment of “the magnitude of the burden”⁷² as well the “legitimacy or importance of the State’s interest[s].”⁷³ The greater the burden, the weightier the justification for it must be.

If burdens upon the Second Amendment right are to be evaluated separately it is necessary to use some criteria that focus only upon the magnitude of the interference with that right. Outright prohibition of guns commonly possessed by law-abiding citizens for self-defense is, according to *Heller*, so burdensome as to be void.⁷⁴ Left untouched are lesser burdens, such as licensing, or limitations upon the right to carry such weapons on one’s person, or regulations governing the transport of such firearms.⁷⁵ One approach might be to import a subjective criterion such as the undue-burden test that has supplanted strict scrutiny for assessing the validity of previability abortion regulations.⁷⁶ Measures that either have the purpose or effect of creating a substantial obstacle to possession and use of a gun for self-defense would be treated as sufficiently burdensome to warrant strict scrutiny, or some other level of heightened scrutiny. The problem with subjective criteria, of course, is that they are susceptible to judicial manipulation to produce a desired result.⁷⁷ Yet, short of drawing the line at outright prohibitions, it is difficult to conceive of bright-line rules to distinguish among burdens. Perhaps that is a reason for considering governmental burdens upon the Second Amendment right as a component of whatever test is ultimately devised to determine which gun regulations are valid.

70. See *Pike*, 397 U.S. at 137.

71. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008).

72. *Id.* at 1622.

73. *Id.* at 1619.

74. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008).

75. *Id.* at 2819.

76. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

77. Compare *Stenberg v. Carhart*, 530 U.S. 914 (2000), with *Gonzales v. Planned Parenthood Fed’n of Am.*, 127 S. Ct. 1610 (2007).

V. LEVEL OF JUDICIAL SCRUTINY

We can dismiss minimal, or "rational-basis," scrutiny, because the Court rejected it in *Heller*.⁷⁸ Governmental infringements upon enumerated rights are universally subjected to some degree of heightened scrutiny. The question is: What should the level of scrutiny be?

If the level of scrutiny is uncoupled from the burden placed upon the Second Amendment right, the magnitude of the burden should determine whether strict scrutiny applies (to regulations imposing an undue or excessive burden), or whether minimal scrutiny applies (to regulations not imposing such burdens). Of course, this formula makes validity turn primarily upon judicial assessment of the burden.

If the level of scrutiny incorporates an assessment of the burden, one risks creating yet another grotesque, unwieldy, malleable multi-factor balancing test. We might say, for example, that as the burden increases the level of justification increases. But what would this mean in practice? Imagine a licensing requirement for possession of a handgun, one that requires proof of successful completion of a handgun safety course, imposes upon the applicant a thirty-day waiting period before the license may be issued (to ensure a thorough background check), and limits the licensee to one handgun. How does one compute the magnitude of this burden? As applied to a person who has publicly taken an unpopular position and thus received anonymous death threats, the thirty-day waiting period might be fatally burdensome, but applied to someone else it might simply be an annoyance. The one-gun limit could eliminate the self-defense right if it turns out that the gun jams and there is no other weapon handy; yet, this unfortunate development may not be entirely the product of governmental interference. Moreover, such questions are likely to be considered before the fact, so their occurrence is a matter of speculation at the moment of the judicial decision. Finally, if the other determinants of the scope of the Second Amendment right (such as the type of weapon protected, who holds the right, and where it may be asserted) are swept into the calculations of burden and justification, the resulting multiplicity of variables threatens to turn judicial review into an unpalatable stew of judicial preferences.

If some semblance of objective bright-line rules is desirable, perhaps we should encourage the Court to develop categorical exclusions or inclusions based upon weapons, persons, and places. More than this is needed, however, to create a reasonably objective decision rule. Perhaps we should subject any governmental interference with the Second Amendment right to heightened scrutiny, but because there are surely a

78. 128 S. Ct. at 2817 n.27.

significant number of firearms regulations that might justifiably infringe the Second Amendment right, we should craft the level of judicial review to be sufficiently severe so that it voids the most burdensome regulations while permitting a fair number of regulations to survive. In an earlier article, I proposed that the government bear the burden of proving that any given regulation substantially advances a compelling governmental interest.⁷⁹ The government will always say that its interest is public health and safety, so it will always contend that it has established a compelling interest. Thus, it is necessary to require the government to bear the burden of proving that the means it has chosen actually do substantially advance this compelling objective. To the extent that there is empirical evidence available on the issue, the government should be required to prove that its justifications actually make a difference in achieving public health and safety. Moreover, this demonstration should be by clear and convincing evidence. Mere assertions of a substantial connection should explicitly be rejected as inadequate. Finally, governments should be required to demonstrate that less burdensome alternatives are significantly less effective than the regulation chosen by the government.

Mushy approaches of the sort advocated by Justice Breyer in *Heller*—voiding only those regulations that have a disproportionate impact on the Second Amendment right⁸⁰—should be avoided. Such an approach requires identification of a baseline for measuring its disproportional impact, and that baseline is likely to be as elusive as the pot of gold at the rainbow's end. Baselines are often the product of perception rather than some objective reality. A minimum wage for women was, in *Adkins v. Children's Hospital*, regarded as “a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.”⁸¹ The absence of a minimum wage was seen, in *West Coast Hotel Co. v. Parrish*, as “a subsidy for unconscionable employers” provided by the community.⁸² Such a law merely corrected the “abuse which springs from [employers'] selfish disregard of the public interest.”⁸³ Baselines are unstable; with changes in perception come changes in reality. A Second Amendment decision rule that relies on disproportionate impact is built upon the shaky foundation of shifting baselines.

79. Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1132–33 (2000).

80. See *Heller*, 128 S. Ct. at 2847 (Breyer, J., dissenting).

81. 261 U.S. 525, 557–58 (1923).

82. 300 U.S. 379, 399 (1937).

83. *Id.* at 400.

CONCLUSION

All of this is speculation. The decision rules that govern the Second Amendment right are not yet known. The course of their development will tell us much about the status of this right which presently exists only as an operational principle. Will it blossom into an enumerated right that we take seriously, or will it fall into the dustbin of effectively discarded enumerated rights, such as the contracts clause? Will it become one of those judicially discretionary rights, akin to the unwritten rights protected by substantive due process? As the television stations like to say, "stay tuned; details at eleven." Alas, you must stay tuned a bit longer; the details will come in highly contested bits and pieces.